into consideration and this is even more clear when the note recorded that his Counsel explicitly referred to the section relating to the taking of outstanding offence into consideration. I also see no merit in this ground of appeal. In the course of arguing this appeal and after I have pointed out the folly of his pursuit, which is that in the event the Court upholds his submission the accused may face a trial of the outstanding offence which the accused said he did not agree to be taken into consideration, Mr. Mirdin Mamdin then said he is not pursuing this ground of appeal.

The remaining grounds of appeal are in substance all directed at the question of the length of sentence. It must follow that when a Court takes into consideration an outstanding offence, the sentence for which the accused was actually convicted may be longer on account of the outstanding offence. There is no irregularity in that. See *Batchelor* [1952] 36 Cr. App. R. 64. Of course, consideration must also be accorded to the accused for admitting to the other offence which saved time and money. See *Hashim bin Pawanchee & Anor. v. PP* [1988] 2 MLJ 66. Though it was not demonstrated how the learned Sessions Judge had erred in imposing the sentence he did, I nevertheless set aside the order of imprisonment because there was inordinate delay in the despatch of the notes of proceedings to the accused. The offence took place in 1983. The accused was convicted on 14 September 1988 and he appealed but the lower Court misplaced the file until I issued an ultimatum which resulted in the recovery of the file but, by then it was 1994. In the meantime, the accused had found gainful employment. If an accused can be prejudiced by the long delay by the Court in supplying the grounds of decision, as held in the case of *Tan Hun Wah v. PP* [1994] 1 AMR 3:113, the accused is also prejudiced by the delay in this case in the supply of the notes of proceedings to the accused. The accused was certainly prejudiced with this uncertainty of whether he will be imprisoned or not. It was because of this that I reluctantly, reluctantly because civil savants should normally go to jail if convicted of corruption offences, set aside the sentence of imprisonment. The fine, which has already been paid, stays. Though, there was hardly any disagreement in this appeal which was heard this morning, I thought it best to reduce into writing what I think is the pertinent law relating to the matter herein.

HAJI BAKTI BIN AMUALI

v.

JIMMY WONG SZE PHIN & 2 ORS.

HIGH COURT BORNEO, TAWAU
TUAN IAN H.C. CHIN J.
[CIVIL SUIT NO. T. 7 OF 1991]
30 APRIL 1994

CONTRACT: Plaintiff purportedly entering into joint venture agreement with 1st defendant to cultivate plaintiff's land - Agreement containing reference to a sale - Plaintiff granting power of attorney to 1st defendant to deal with land - Agreement to sell land and divide proceeds after land developed - 1st defendant failing to pay agreed sum under agreement - Revocation of power of attorney - Sale of land to 2nd and 3rd defendants without plaintiff's consent - Whether the agreement entered into between the plaintiff and 1st defendant was a joint venture agreement or a sale and purchase agreement - Whether agreement illegal - Whether against public policy - Whether agreement tainted by fraud - Whether power of attorney lawfully revoked - Consideration of s. 24 Contracts Act 1950 - Sections 34(1), 88 & 171(A)(1) of the Sabah Land Ordinance.

PRACTICE & PROCEDURE: Breach of contract - Whether plaintiff's action time barred - Limitation Ordinance item 93 of the Schedule - O. 59 r. 8 Rules of the High Court 1980.

WORDS & PHRASES: Sabah Land Ordinance (Cap. 68), s. 4 - "transfer", "memorandum".

On 26 September 1983 the plaintiff entered into what was purported to be a joint venture agreement with the 1st defendant to cultivate his land for which the 1st defendant agreed to pay the plaintiff RM30,000. On the same date the plaintiff executed a power of attorney in favour of the 1st defendant to enable him to deal with all matters in connection with the land. It was also agreed between the parties that the land would be eventually sold after it had been fully developed and the proceeds divided between them. The 1st defendant failed to make the agreed payment and sold the land to the 2nd and 3rd defendants without the plaintiff's consent.

The plaintiff admitted signing a document dated 27 September 1983 (P1) containing an agreement for the resale of the land and which made reference to a sale and purchase agreement dated 26 September 1983 (D1). He also admitted signing the last pages of D1 and a power of

attorney (D2) which he allegedly had revoked but he claimed that D1 was not the agreement he signed as he had apparently signed all the pages of D1. He alleged that someone had switched three pages of D1. Plaintiffs' Counsel however claimed that P1 was in fact the joint venture agreement signed by the plaintiff. Furthermore, plaintiff's Counsel submitted that the transaction had breached the condition of title and was thus illegal and against public policy. The 1st defendant on the other hand stated that the agreement mentioned in P1 referred to D1. He denied seeing or receiving a deed of revocation.

Held:

[1] If the agreement, which the plaintiff maintained he had signed on all four pages, contained all the terms for a joint venture agreement, including a term for division of the land or proceeds of sale, it made no sense for P1 to be prepared and executed making provision for something which the alleged agreement had already provided. P1 must have been prepared to provide for something which the D1 had not provided for, which was to provide for the eventuality of a resale. Therefore the Court found that D1 was the document which the plaintiff had knowingly executed and that there was no such joint venture agreement.

[2] The Court was of the view that if the transaction between the plaintiff and 1st defendant was in breach of the condition or term of title, then the transaction was illegal but the issue turned principally on the meaning of the word "transfer" in the said term. The Land Ordinance only recognises interests which are registered in accordance with s. 88 of the Land Ordinance. Though equitable rights or interests in land can still be created and are recognised by law, they are not dealt with by the Land Ordinance. Therefore, when the word "transfer" is used in any document or memorandum it must necessarily refer to a legal transfer and the registration of a transfer and not to a sale not involving a transfer until after the full development of the land. The term does not prohibit transfer absolutely; it in fact allows a transfer after the land has been developed. The transaction herein provides for compliance with the term of the title, that is the development of the land in full, before transfer. The Court was therefore of the view that the transaction herein did not infringe the term and was not illegal.

[3] To allow a sale without a transfer until the land is brought into cultivation would serve the government policy of distributing wealth to and benefitting all its citizens, and also achieve its policy of bringing idle land under cultivation. The Court was therefore of the view that the transaction was not against public policy.

[4] The question of fraud was a non-issue as the Court found that the plaintiff had willingly executed D1 and D2 and had agreed to the terms therein. In any event the plaintiff had failed to prove fraud on the part of any of the defendants. There was therefore no question of the sale to the 2nd and 3rd defendants being tainted with illegality or fraud. The attempt by the plaintiff to revoke the power of attorney was of no effect because the plaintiff had himself declared in D2 that he had received valuable consideration and had declared D2 to be irrevocable.

[5] The Limitation Ordinance (Cap. 72) item 93 of the Schedule provides for a period of limitation of three years commencing from the time "when the facts entitling the plaintiff to have the contract rescinded first become known to him." About 5 October 1983 the plaintiff realised that the land was sold instead of being developed for a "joint venture". Thus the plaintiff had by 5 October 1983 known of the facts entitling him to rescind the sale of the land which means that he had until 5 October 1986 to issue the writ but he did not do so until 8 February 1991. Accordingly the claim against the defendants was statute barred.

[Plaintiff's claim dismissed with costs to the 1st defendant. Costs of 2nd and 3rd defendants to be paid by plaintiff's Counsel personally].

Cases referred to:

Waniwang Sdn. Bhd. v. Violet Holdings Sdn. Bhd. & 2 Ors. (High Court, Tawau Suit No. T(22) - 70 of 1992) ***(refd)***

Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 MLJ 81 FC ***(refd)***

Hassan v. Ismail [1970] 1 MLJ 210 FC ***(foll)***

Wong Leong Sing & Anor. v. Wong Tat Ann [1989] 1 CLJ 542 ***(dist)***

Hee Cheng v. Krishnan [1955] MLJ 103 ***(dist)***

Murugesan v. Krishnasamy & Anor. [1958] MLJ 92 ***(dist)***

Karpal Singh v. Atip Bin Ali [1987] 1 MLJ 291 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24

Limitation Ordinance (Cap. 72), item 93 of Schedule

Rules of the High Court 1980, O. 59 r. 8

Sabah Land Ordinance (Cap. 68) ss. 4, 34(1), 88 & 171(A)(1)

Other sources referred to:
Aktin's Court Forms, 2nd Edn., Vol. 32 (1992), para 3
Halsbury's Laws of England, 4th Edn., Vol. 37, p. 513
Powers of Attorney, Andrew Long, pp. 45-46

For the plaintiff-Basalie Hj. Ahmad; M/s. Basalie & Co.
For the 1st defendant-P.K. Lim; M/s. P.K. Lim & Co.
For the 2nd & 3rd defendants-Chung Thau Yong; M/s. Shim Pang & Co.

JUDGMENT

Ian H.C. Chin J:
This is an action by Hj.Bakti bin Amuali ("the plaintiff") against Jimmy Wong Sze Phin ("the 1st defendant"), Wong Thien Kong ("the 2nd defendant") and Wong Soon Fah ("the 3rd defendant"). As to what the cause of action is, it will take some effort to figure out, if that is at all possible. In order to appreciate what I am faced with, the following is a faithful reproduction of the statement of claim of the plaintiff, viz:

Statement of Claim

1. The plaintiff is the registered owner of a piece of land under CL 105398981 and having his residence at Kampung Titingan, Tawau, Sabah.
2. The 1st defendant is businessman residing at No. 1981, Jalan Sin On, Tawau, Sabah.
3. The 2nd and 3rd defendants were subsequent purchasers of the land bearing Serial No. CL 105398981.
4. The plaintiff is the registered titleholder of the land bearing the Serial No. CL 10539891 containing 99 hectares (approximately 244.9 acres) more or less situate at Ulu Kalumpang in the District of Tawau (hereinafter referrred to as the said land).
5. That the 1st defendant had sometime around the month of early September 1983 approached the plaintiff to enter into a joint venture partnership whereby the plaintiff agreed to charge the said land and the 1st defendant agreed to allocate funds for the purpose of planting the said land with cocoa.
6. That the plaintiff verily believed that on 26 September 1983 a joint venture agreement and a power of attorney (hereinafter refered to as the said deeds) were executed and by virtue of the said deeds the 1st defendant was empowered to perform and execute all or any of the acts, things, matters, and deed relating to and in connection with the said land, *inter alia*:
   (1) To charge the said land to secure loan and to develop the said land.
   (2) The 1st defendant agreed to provide substantial funds for the purpose of planting the said land with cocoa.
   (3) The 1st defendant agreed to develop the said land to be fully planted with cocoa.
   (4) That both the plaintiff and the 1st defendant agreed to sell the land after it has been fully developed or otherwise would be divided in the proportion of 40% to the plaintiff and the remaining to the 1st defendant.
   (5) It is further agreed that the 1st defendant shall pay the plaintiff a sum of RM30,000 upon signing said deeds.
7. That the plaintiff verily believed and claimed that the said deeds executed on 26 September 1983 were signed by the plaintiff on each and every page.
8. That at the time of the said deeds were executed the said land was not yet developed.

Particulars

1. That upon signing of the said deeds the 1st defendant failed to pay the plaintiff a sum of Thirty Thousand Ringgit (RM30,000) only. Later, the 1st defendant asked the plaintiff to collect the money in the 1st defendant's office wherein the 1st defendant issued a cheque worth Ten Thousand Ringgit (RM10,000).
2. The 1st defendant agreed to pay the balance of Twenty Thousand Ringgit (RM20,000) within one (1) week. However, the 1st defendant failed to release payment to the plaintiff after one (1) week has lapsed.
3. Upon presenting the RM10,000 Cheque at the Sabah Bank Berhad, Tawau Branch, the bank refused to make payment because the 1st defendant has no sufficient money in his account.
4. That the 1st defendant intended to defraud and/or induce the plaintiff all the time even prior to the execution of the said deeds.
5. As of recent, the plaintiff found that the said land was sold to the 2nd and 3rd defendants by the 1st defendant without prior consent of the plaintiff and that the sale and purchase agreement executed on 13 November 1985 (hereinafter referred to as the said document) entered between the 1st defendant and the 2nd and 3rd defendants is not enforceable being void and of no effect because it contravenes the express conditions of the title deeds.
6. There are no reasons whatsoever that the said document is true because the terms and conditions of the said land prohibited transferring/selling unless the said land has been fully developed.
7. The plaintiff avers at the preparation of the said document and the solicitors preparing the said document had advised the defendants in writing to the effect that both the

said documents would be unenforceable in law for breach of express terms and conditions of s. 34 Sabah Land Ordinance (Cap.68)

8. The deed entered between the parties hereto and referred to in the said document is in breach of the express terms and conditions of the title deed of the said land in that they have no power of selling and transferring the said land to the subsequent purchasers.
9. By reasons of the matters aforesaid the plaintiff avers that the said document and the said deeds entered between the parties herein are not enforceable being void and of no effect as the said title deed is in breach of s. 34 of Sabah Land Ordinance (Cap. 68) where the terms and conditions of the said title deed prohibited transferring and selling the said land and not valid in law.
10. Further or alternatively the plaintiff avers that in breach of the terms and conditions of the title deeds nullified any subsequent transaction.
11. The plaintiff sought to revoke the power of attorney and terminated the joint venture agreement.
12. That the plaintiff had several times informed the 1st defendant that the said deed has already been revoked by the plaintiff's solicitors even before the 1st defendant sold the said land to the 2nd and 3rd defendants.
13. In the premises, the plaintiff has suffered loss and damages.

Wherefore the plaintiff claims:

(1) Rescission of the said deeds;
(2) Possession of the said property;
(3) General damages;
(4) Interest therein;
(5) Further and other relief that the Court deems just equitable;
and
(6) Costs.

Dated 15 December 1990.

[Signed]
Advocates for plaintiff.

Despite its prolixity, one still has to resort to surmise to unearth the cause of action buried in the above verbiage. I was hopeful that light will be shed when Mr. Basalie Hj. Ahmad, Counsel for the plaintiff, opened his case on 25 April 1994 but this was not to be so, and, in fact, the matter became more clouded as a result of his opening address which reads:

> Claim for recovery of land which was sold to 2nd and 3rd defendants by first defendant without the consent of the plaintiff. Plaintiff will adduce some documents like joint venture agreement, dishonoured cheques, land search and copy of title deed. I wish to call my first witness.

That could hardly be called an opening address. I had the occasion in the unreported case of *Waniwang Sdn Bhd v. Violet Holdings Sdn. Bhd. & 2 Ors.* (High Court Tawau, Suit No. T (22)-70 of 1992) to apprise myself the function of an opening address and I, in the judgment of that case, reproduced **Halsbury's Law of England**, 4th Edn., Vol. 37, para 513 which says:

> 513. Presentation of parties cases at the trial.
>
> The presentation of the case of each party at the trial of an action ordinarily takes the following course, subject to any variations arising out of the mode of trial or the directions of the trial Judge.
>
> Immediately, the case is called on for trial, Counsel or, if there is one, leading Counsel for the plaintiff will open the case. The object of an opening is to give the Court a general notion of what will be given in evidence. The opening of a case is an occasion of crucial importance and needs to be prepared and presented with great care, skill and deliberations; it informs the Judge about the case and at the same time points to the strength of the plaintiff's case and the weakness of the defendant's case. In his opening, Counsel states what he submits are the issues and questions between the parties which have to be determined, what are the facts of the case, the substance of the evidence he has to adduce and its effect on proving his case, and he will refer to the relevant correspondence between the parties and other documents. He will remark upon any point of law involved in the case, but the opening is not the occasion for detailed argument on legal questions or an extensive examination of the authorities....
>
> The closing speeches of Counsel for the parties are, like the opening of the case by Counsel for the plaintiff, occasions of extreme importance in the presentation of the parties' case. The facts are reviewed, the evidence is closely analysed, the witnesses are acclaimed or criticised, submissions are made as to the weight to be attached to their evidence and reasons are suggested why their evidence should be accepted or rejected, and the points of law arising are argued out in full, with citation of the relevant authorities. The trial Judge relies a great deal on the assistance of Counsel in arriving at his final determiantion.
>
> After Counsel have concluded their speeches, the trial Judge will ordinarily forthwith deliver judgment.

It is obvious from the authority that I have just cited that the opening speech of Mr. Basalie fell woefully short of the objective. As for the statement of claim *(supra)*, it infringes almost every rule of pleadings, *viz*: the rules against prolixity, against pleading evidence and against pleading argument; even the numbering of the paragraphs created confusion because the same numbers are used for different paragraphs. How pleadings should be drafted are very well set out in **Atkin's Court Forms,** 2nd Edn., Vol. 32 (1992 issue) from para 3 onwards, there is no excuse for the manner the statement of claim *(supra)* was drafted. Despite the defences and replies, in the end I have also to resort to the explanation of Mr. Basalie, the closing speeches of all the Counsel and the evidence adduced to gather what the issues are in this case. As a result of that exercise, the issues appear to be:

(1) whether there was an agreement for the sale and purchase of the land entered into between the plaintiff and the 1st defendant and if there was:

   (a) whether such sale was illegal for being in breach of the condition in the title to the land; and
   (b) whether such agreement was procured by the fraud of the 1st defendant.

(2) whether there was any joint venture agreement entered into between the plaintiff and the 1st defendant for developing the land instead of the agreement for sale and purchase referred to in (1) and if there was, whether such joint venture agreement was illegal for breach of the condition in the title to the land;

(3) whether the sale and purchase agreement entered into between the 1st defendant and the 2nd and 3rd defendants is:

   (a) illegal; or
   (b) tainted by the fraud of the 1st defendant.

(4) whether the power of attorney D2 was lawfully revoked; and

(5) whether the plaintiff's claim is statute-barred.

I will first summarise the main evidence for the plaintiff followed by that of the defence.

Plaintiff's Evidence

The plaintiff testified that Ummal bin Hj. Mahmud ("PW2") introduced him to the 1st defendant and that he thereafter went with PW2 to the office of Messrs Chong & Pang, a firm of advocates, where he signed a document (exhibit "P1") dated 27 September 1983. This document reads:

Jimmy Wong Sze Phin,
P.O. Box 669,
Tawau
27 September 1983

Tuan,

RE:CL.105398981
LA No. 8110030
99.11 hectares at
Ulu Kalumpang Tawau.

Further to the agreement dated 26 September 1983 entered into between you and me for the sale and purchase of the above-stated land, I hereby write to confirm that in the event I sell the said land to a third party, you will entitle to 40% of the purchase price of the resale less costs and expense incidental to the sub-sale.

Yang benar,
[Signed by 1st defendant]

[Signed by plaintiff]

To: Bakti Bin Amualy Hj
Semporna.

[Signed]
Ummal b.Hj.Mahmud.

The plaintiff testified that an unnamed lawyer of Messrs Chong & Pang explained to him in Malay that this document P1 states that the 1st defendant would expend money to cultivate the land concerned and that thereafter the land would be sold or partitioned with the plaintiff getting 40% while the 1st defendant will get 60%. He was also on the same day but in the house of the 1st defendant given a post-dated cheque for RM10,000 (exhibit "P2") by the 1st defendant. He admitted to signing a power of attorney (exhibit "D2") and (when cross-examined) also admitted signing the sale and purchase agreement (exhibit"D1"), both dated 26 September 1983 but he said that all the pages of these two documents should have his signatures because he had put his signatures on them whereas the two documents D1 and D2 only have his signatures on the last pages. In order to appreciate what the plaintiff alleges, the sale and purchase agreement (D1) is reproduced here:

An agreement made 26 September One thousand nine hundred and eighty-three (1983)

Between Bakti Bin Amualy Haji (I/C NO. H0635489) of P.O. Box No. 149 Semporna in the State of Sabah (hereinafter referred to as "the Vendor" which expression shall where the context so admits include his personal representatives and assigns) of the one part **And Jimmy Wong Sze Phin** (I/C No. H0238800) of P.O.Box No.669 Tawau in the State of Sabah (hereinafter referred to as "the Purchaser" which expression shall where the context so admits include his personal representatives and assigns) of the other part.

Whereas:

(1) The vendor reprensents to the purchaser that he is the successful applicant of a piece of land under LA No.8110030 and now described in Tawau Country Lease No.105398981 containing 99.11 hectares (approximately 244.9 acres) more or less and situate at Ulu Kalumpang in the District of Tawau (hereinafter referred to as "the said land").

(2) The vendor has agreed to sell and the purchaser has agreed to purchase the said land upon the terms and conditions hereinafter contained.

Now It is Hereby Agreed as follows:

1. In consideration of the sum of Malaysian Ringgit Thirty Thousand (RM30,000) to be paid to the vendor by the purchaser in the manner hereinafter provided the vendor shall sell and the purchaser shall purchase **All That** the said land free from encumbrances upon and subject to the terms and conditions hereinafter contained.
2. The purchase price shall be paid as follows that is to say:
   (a) A sum of RM20,000 by way of deposit and part payment immediately on the signing of this agreement;
   (b) The balance sum amounting to RM10,000 within two (2) weeks after the issuance of the draft title deed to the said land.
3. As soon as reasonably practicable after the execution of this agreement the purchaser shall and is hereby authorised by the vendor to enter upon the said land and cultivate the same at his own costs and expenses and in accordance with the terms and conditions contained in the document of tittle to the said land.
4. The vendor shall execute or cause to be executed a valid and registrable memorandum of transfer of the said land in favour of the purchaser and/or his nominees when the said land shall have been brought fully under cultivation or permission of such transfer shall have been obtained from the Director of Lands & Surveys.
5. Notwithstanding the completion of sale as hereinbefore provided the purchaser shall as from the date hereof be entitled to receive and enjoy the rents and profits accruing from the said land to the exclusion of the vendor.
6. All quit rents and outgoings in respect of the said land shall be apportioned between the vendor and the purchaser as at the date hereof and the amount due by virtue of such apportionment shall be paid to the party to which the same is due.
7. The vendor shall pay all tax payable under the Real Property Gains Tax Act 1976, in respect of the sale herein and shall indemnify the purchaser fully for any claim arising therefrom.
8. The purchaser shall pay all stamps duties solicitors' charges and all other costs and expenses in any way arising out of or connected with this agreement.
9. **It Is Hereby Declared** that this agreement and the memorandum of transfer referred to in Clause 4 hereof are instruments employed in one transaction to complete the sale of the said land within the meaning of s. 4(3) of the Stamp Ordinance Cap.137 of the Laws of Sabah and for the purpose of the said section the said memorandum of transfer is deemed to be the principal instrument.

In Witness Whereof the parties hereto have hereunto set their hands the day and year first hereinbefore written.

[Signed by plaintiff and 1st defendant]
[Witnessed by Frederick Lo of Tawau.]

Clause 9 *(supra)* and the following part of this agreement D1 were typed on the page where the plaintiff had signed whereas the preceding pages do not bear his signature. The power of attorney D2 which the plaintiff only admits to signing is also reproduced here:

This Power Of Attorney created this 26 September One Thousand Nine Hundred and Eighty-Three (1983) by me Bakti bin Amuali Haji (I/C No. HO635489) of P.O.Box No. 149 Semporna in the State of Sabah.

Whereas I am the successful applicant of a piece of land under LA No. 81100307 and now described in Country Lease No. 105398981 containing 99.11 hectares (approximately 244.9 acres) more or less and situate at Ulu Kalumpang in the District of Tawau (hereinafter referred to as "the said land").

Now This Deed Witnesseth that I the said Bakti Bin Amuali Haji hereby appoint Jimmy Wong Sze Phin (I/C No. H0238800) of No.1981 Mile 2 $^{1}/_{2}$ Jalan Sin On Tawau in the State of

Sabah to be my attorney in my name and on my behalf to do all or any of the following acts and things namely:

1. To manage cultivate and farm the said land and obtain make and sign application to and negotiate with the Agricultural Department appropriate Government Department and local authority for all licences consents and permits required by any statutory instrument order by-law or otherwise in connection with the cultivation and management of the said land.
2. To sell or otherwise dispose of the said land upon such terms as my attorney shall think fit and for that purpose to sign and execute all documents (including contracts) necessary for effectuating such sale or disposal.
3. To charge the said land and to sign any undertaking and all necessary documents relating thereto to any bank or finance company to raise money for the development of the said land.
4. To transfer the said land to my attorney or his nominee or nominees and for that purpose to sign and execute memorandum of transfer and all documents necessary for effectuating such transfer.
5. To register or cause to be registered or filed with or by any Courts officers or government authorities all such deed memorandum of transfer instruments and writing executed in respect of the said land and to do or cause to be done any acts and things required by laws for the time being in force in the state of Sabah to perfect and complete the same.
6. To warn off and prohibit and if necessary proceed against in due form of law all trespassers on the said land and take appropriate steps whether by action or otherwise to abate all nuisances.
7. To appoint and remove any substitute for or agent of my attorney in respect of all or any of the matters aforesaid.
8. Generally to do all such lawful acts and things as my attorney shall think advisable for the purpose aforesaid as fully and effectually in all respects as I could do myself.

And I Hereby Agree And Undertake to ratify and confirm all and whatsoever my attorney substitute or agent apointed by my attorney shall lawfully do or cause to be done by virtue of this deed.

And I Hereby Declare that this power of attorney granted for valuable consideration shall be irrevocable without the written consent of my attorney.

In Witness Whereof I have hereunto set my hand and seal the day and year first hereinbefore written.

[Signed by the plaintiff before Frederick Lo of Tawau.]

The plaintiff further testified that the power of attorney D2 was revoked by him by a deed made 26 September 1983 which was prepared on his instuction by a lawyer called Douglas Lind. This deed of revocation (exhibit P6) reads:

Revocation

A power of attorney made 26 September 1983 by me Hj Bakti Bin Amuali of Semporna, State of Sabah, Malaysia.

Whereas

1. By a Power of Attorney dated 26 September 1983 I appointed Jimmy Wong Tze Phin of P.O.Box 669 Tawau, State of Sabah, Malaysia my attorney for me and in my name to do certain acts and things previously described as LA 81100307 and now described as CL 105398981 measuring 99.11 hectares more or less and situate at Ulu Kalumpang, Tawau, Sabah (hereinafter referred to as "the said land").
2. The said power of attorney is now registered in the Central Land Registry as CLO P/A 01344.

Now This Deed Witnesseth that I revoke the said power of attorney and authority thereby conferred.

In Witness Whereof the said Hj Bakti Bin Amuali hereto and hereunto set his hand the day and year first above written.

[Signed by plaintiff before Douglas Lind of Kota Kinabalu]

When cross-examined, he did not agree that D1 was the agreement referred to in the document P1 and he also did not agree D1 is the agreement mentioned in para.6 of the statement of claim *(supra)*. Seeing that it was pointless to ask the plaintiff what the pleading speaks of, I turned to Mr. Basalie for an answer and he told the Court that the "Joint Venture Agreement" which para 6 mentions and alleges to have been executed on 26 September 1983 refers to P1 which is dated 27 September 1983. More of the plaintiff's evidence will be adverted to when I deal with the evidence of the 1st defendant.

The only other witness to testify for the plaintiff was PW2. He said that it was on 27 September 1983 that he, the plaintiff and the 1st defendant met in a lawyer's office where he witnessed the execution by the 1st defendant and by the

plaintiff of the document P1 in the room of a lawyer. He also said that the 1st defendant did not give any money to anyone. He went there at the request of the plaintiff and P1 was executed because the plaintiff was not happy with an agreement in English he had signed with the plaintiff. He testified that, that was the only time he went with the plaintiff to the lawyer's office though he went on an earlier occasion with the 1st defendant. He also testified that the lawyer did not agree to attest P1. Those are the evidence at the close of the case for the plaintiff. The defendants elected to adduce evidence.

Defence Evidence

The 1st defendant testified that it was PW2 who introduced him to the plaintiff which resulted in the execution of the agreement D1 under which he agrees to buy the land at RM30,000 from the plaintiff. The agreement D1 was prepared by Messrs Chong & Pang, executed by him and the plaintiff and witnessed by an advocate Frederick Lo, all on 26 September 1983. He confirmed that PW2 was in the office of Messrs Chong & Pang but that he was not in the room of the advocate Frederick Lo where discussions of the terms of the sale were had. He heard Frederick Lo explained to the plaintiff the terms of the agreement D1. He alleged that after the execution of the agreement D1, he paid the plaintiff RM20,000 as provided for under clause 2(a) of the agreement D1 and that this was witnessed by Frederick Lo. As for the RM10,000 under clause 2(b) he said he gave a cheque (exhibit "P2") to the plaintiff either in the office of Messrs Chong & Pang on 26 September 1983 or the next day in his office but that he later asked the plaintiff not to cash the cheque because the premium and survey fee for the land had not been fully paid. He said the premium payable was RM12,245 and the plaintiff had only paid 25% of that amount. The plaintiff agreed not to cash the cheque. To a question by Mr. P.K. Lim, Counsel for the 1st defendant, as to what arrangement to redeem the cheque had been made, the 1st defendant replied that this was done by supplying sundry provision and by paying cash to the plaintiff and the 1st defendant thereafter referred to 5 payment vouchers (exhibits D3(a) - (e)) dated respectively 18 October 1983, 18 October 1983, 6 December 1983, 2 January 1984 and 15 February 1984, all for the total amount of RM8,000, of which four vouchers were for the total cash payment of RM4,688 while the other voucher was in reference to an invoice (exhibit D4(a)) for goods for the value of RM3,322. All the vouchers were signed by the plaintiff. The 1st defendant also produced 12 invoices for goods which the plaintiff acknowledged he had taken (exhibits "D4(a)-(l)") and they make up a total value of RM16,427.05. As for the goods supplied to the plaintiff, the 1st defendant explained that they were supplied to off-set the balance of RM10,000 and also "to support plaintiff in his timber operation". As for the document P1 he admittted signing the same but that it was prepared by him and signed in his office on 27 September 1983. He explained that the agreement mentioned in P1 refers to the agreement D1. He denied seeing or receiving the deed of revocation P6. He testified that he sold the land to the 2nd and 3rd defendants under an agreement made 13 November 1985 (exhibit"D5") for a sum of RM100,000.

The 2nd and 3rd defendants gave unchallenged evidence to the effect that they do not know the plaintiff, that they paid the 1st defendant RM100,000 for the land and that after they had developed the land by planting cocoa treees the title of the land (exhibit "D8") was registered in their names on 31 October 1991 and this was after the memorandum of transfer signed by them on 3 October 1991 was registered by the land office. They had no knowledge of the dispute concerning this land until they saw the writ herein against them in a newspaper on 24 October 1991.

Conclusions

A determination of whether the agreement D1, which is dated 26 September 1983, and the power of attorney D2, dated the same day, embody the consensus of the plaintiff and the 1st defendant would resolve a number of the issues to be decided in this case. The plaintiff had admitted signing the respective last page of the two documents. As for the agreement D1 he maintained that the three pages preceding the page where he had put his signature were signed by him, that is all the pages were signed by him, whereas three pages of the agreement D1 do not bear his signature and therefore the agreement D1 is not the agreement he had signed. He said that he was not able to get a copy of the agreement he had signed from Messrs Chong & Pang. The plaintiff stated that para 6 of his statement of claim, which mentions a "Joint Venture Agreement" executed on 26 September 1983, refers to the agreement which he had sign on all pages. In an attempt to clear

the air, I turned to Mr. Basalie at that juncture to seek his clarification and he stated that para 6 of the statement of claim refers, contrary to what the plaintiff said, to the document P1 which is dated 27 September 1983. It was after this that the plaintiff then said both the documents, that is P1 and the agreement bearing his signature on all the pages, were signed in the office of Messrs Chong & Pang. He was asked to explain why clause 9 of the document D1 which can be found on the page he had signed talked about a sale rather than a joint venture agreement, he replied that he was not explained the purport of the said clause 9. Therefore apart from alleging that he had not been explained clause 9, he also alleged that someone had switched three pages of the agreement D1. On the evidence so far reviewed, has the plaintiff then established that the agreement D1 is actually not the agreement he had signed? In this respect, we have only the words of the plaintiff. As for the allegation that the pages of the agreement D1 had been switched, it is an allegation of fraudulent conduct which the plaintiff has the onus of proving beyond reasonable doubt. See *Tai Lee Finance Co. Sdn Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81 FC. Apart from the reason that three pages of the agreement D1 did not bear his signature, the plaintiff did not state, one way or the other, whether the terms stated in the three pages of the agreement D1 were terms which he had agreed. Despite the confusion surrounding para. 6 of the statement of claim, it can be discerned that the terms of the agreement which the plaintiff alleged should be, are out in para 6 of the statement of claim, but yet the plaintiff made no attempt to prove them in his evidence. Instead, he adverted to the document P1 which he maintained provides for the 1st defendent to come out with the money to develop the land and that thereafter the land or the proceeds of sale was to be divided forty sixty, with him getting forty per cent. The plaintiff's evidence had to be examined with the contemporaneous documents as well as other evidence to determine its truthfulness. The agreement D1 was made on 26 September 1983 while the document P1 was made on 27 September 1983. The document P1 refers to the "agreement dated 26 September 1983 ..." which perforce means that by the time of the document P1, the "agreement dated 26 September 1983 was already in existence. If the agreement, which the plaintiff maintained he had signed on all four pages, contains all the terms for a joint venture agreement, including a term for the said forty sixty division of the land or the proceeds of sale, it makes no sense for the document P1 to be prepared and executed making provision for something which the alleged agreement had already provided. The document P1 must have been prepared to provide for something which the agreement D1 had not provided for, which is to provide for the eventuality of a resale. Therefore, it is more probable than not that the agreement D1 was the agreement which the plaintiff had willingly signed after Frederick Lo had explained to him the contents. Certain event had taken place after the execution of the agreement D1 which event probably led to the execution of the document P1 providing for the 1st defendant to pay the plaintiff "40% of the purchase price of the resale less costs and expense incidental to the sub-sale". What those events were, the parties did not bother to reveal to the Court. The evidence of PW2 seems to confirm this when he, after being referred to the document P1, said: "I signed because plaintiff and [1st defendant] had already signed an agreement in English but plaintiff was not happy. [The 1st defendant] then agreed to make another letter in Bahasa Malaysia where I signed as a witness. I thought the letter was in Bahasa Malaysia." PW2 was testifying to an agreement which the plaintiff had already signed but was afterwards not happy with and which resulted in the 1st defendant executing P1 on 27 September 1983. It is not the claim of the plaintiff that he is entitled to "40% of the purchase price of the resale less costs and expense incidental to the sub-sale" and therefore I cannot adjucate on that. In order to avoid further strife there is no point for the plaintiff to commence an action for that purpose because it is time-barred. Back, after this short digression, to the issue of the agreement D1. This document P1 therefore does not support the allegations of the plaintiff that that agreement D1 was not the agreement that he had signed. No reason was advanced by the plaintiff nor by his Counsel as to why Frederick Lo would want to lie to the plaintiff as regards the contents of the agreement D1. In fact, Mr. Basalie was being very abusive for submitting without any foundation that Frederick Lo had been fraudulent. I therefore find as a fact that the agreement D1 was the agreement which the plaintiff had willingly signed and incorporating all the terms he had agreed to after Frederick Lo had explained the contents to him. This means that the plaintiff

had in fact agreed to sell the land to the 1st defendant and the documents employed for the purpose were the agreement D1 and the power of attorney D2, which latter document the plaintiff had also executed and pleaded its existence in para 6 of his statement of claim. There are other documentary evidence that support the conclusion that the plaintiff had agreed to the sale of the land in the manner stated in the agreement D1. The payment vouchers (D3(a)-(e) which the plaintiff acknowledged the receipt of cash or payment in kind from the 1st defendant were in payment of the purchase price of the land. Though the payments due under the agreement D1 were not in accordance with the agreement D1, they are not issues here as the plaintiff's action is not founded on a breach of contract nor on a breach of a fundamental term. Therefore, nothing turns on that point. There is yet another factor which makes the plaintiff's allegation unpalatable; he said he knew he was deprived of his land some 10 days after the signing of the document P1, which puts the date at sometime in October 1983, and yet he did not take action until 1991. No one sleeps on his right for so long if he had really been wrongfully deprived of his land. The plaintiff also did not explain why he continued to receive cash from the 1st defendant betwen 18 October 1983 and 15 February 1984 in payment of the land (D3(b)-(e)) when he alleged that he had not agree to sell the land to the 1st defendant. Finally, even the document P1 which the plaintiff relies on for his case speaks of a sale by the plaintiff to the 1st defendant and of a resale. Therefore, I find that the agreement and the power of attornney D2 are the documents which the plaintiff had knowingly executed and that there are no such agreement as a joint venture agreement. This brings me to the next issue, which is whether the sale by the plaintiff to the 1st defendant is illegal.

Mr. Basalie argued that the sale of the land is forbidden by law and therefore the sale is void. This argument centres around a term in the title to the land which reads:

> Transfer And Sublease Of This Title Is Prohibited Until such Time As The Said Land Has Been Fully Developed In Accordance With The Terms And Conditions Herein.

The relevant terms of the agreement D1 are clauses 3 and 4 *(supra)* which for ease of reference I will repeat here, read:

> 3. As soon as reasonably practicable after the execution of this agreement the purchaser shall and is hereby authorised by the vendor to enter upon the said land and cultivate the same at his own costs and expenses and in accordance with the terms and conditions contained in the document of title to the said land.
>
> 4. The vendor shall execute or cause to be executed a valid and registrable memorandum of transfer of the said land in favour of the purchaser and/or his nominees when the said land shall have been brought fully under cultivation or permission of such transfer shall have been obtained from the Director of Lands & Surveys.

When the agreement D1 is read with the power of attorney D2, there is no doubt that the combined effect of these documents was to confer upon the 1st defendant every right associated with the ownership of the land. Mr. Basalie submitted that the transaction had infringed the condition in the title and he referred the Court to s. 24 of the Contracts Act 1950, ss. 34(1) and 171 (A)(1) of the Land Ordinance (Cap.68). The Contracts Act 1950, s. 24 says:

> 24. What considerations and objects are lawful, and what not.
>
> The consideration or object of an agreement is lawful, unless -
>
> (a) it is forbidden by law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another, or
> (e) the Court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Mr. Basalie, in referring to all the limbs, implied that the transaction is in breach of all the limbs of s. 24 of the Contracts Act, 1950. As for s. 34(1) of the Land Ordinance (Cap.68), it merely provides for forfeiture of the land, if the government so desires, it there is a breach of the condition in the title. As for s. 171A.(1), it provides for a maximum fine of RM10,000 and or imprisonment of up to two years for a breach of any condition or term of the title. I am of the view that if the transaction between the plaintiff and the 1st defendant is in breach of the condition or term *(supra)* of the title, then the transaction is

illegal. The issue turns principally on the meaning of the word "transfer" in the said condition. It will be recalled that the agreement D1 provides for the transfer of the land to be effected only after the cultivation, that is the full development, of the land. Since the title to the land is a creature of the Land Ordinance and since the terms and conditions of the title are imposed pursuant to powers given under the Land Ordinance, one must first look to the Land Ordinance to determine the meaning of the word "transfer". The word "transfer" is defined in s. 4 of the Land Ordinance, *viz*:

> "transfer" used in connection with land or a charge means the passing of such land or charge by act of the owner or chargee or by order of the Collector or Director or of the Court, and also the memorandum in which such passing is recorded;

and the word "memorandum" is also defined, *viz*:

> "memorandum' means the document recording any dealing, decision or order required to be registred under this Ordiance.

The Land Ordinance only recognise interests which are registered in accordance with s. 88 of the Land Ordinance. Though equitable rights or interests can still be created and are recognised by law, they are not dealt with by the Land Ordinance. Therefore, when the word "transfer" is used in any document or memorandum it must necessarily refer to a legal transfer and the registration of a transfer and not to a sale not involving a transfer until after the full development of the land. The prohibition is against the registration of any transfer, that is a legal transfer as opposed to a sale of an equitable interest, until the land is fully cultivated. It does not prevent equitable dealings like that of the present case where registration of the dealing is not intended until fulfilment of the term of the title. The term does not prohibit transfer absolutely; it in fact allows a transfer after the land had been developed. The transaction herein provides for compliance with the term of the title, that is, the development of the land in full, before transfer. I am therefore of the view that the transaction herein does not infringe the term and is, therefore, not illegal. The case of *Hassan v. Ismail* [1970] 1 MLJ 210 FC, a case cited by Mr. Chung Thau Yong, Counsel for the 2nd and 3rd defendants, is authority for my decision. In this case too, there is no absolute prohibition against a transaction which provides for complaince with the term of the title before a transfer is effected. The Court was referred by Mr. Basalie to the case of *Wong Leong Sing & Anor. v. Wong Tat Ann* [1989] 1 CLJ 542 where the Court there held that a sale was void as being in contravention of the following restriction:

> (i) The land hereby alienated shall not be transferred, nor shall it be leased, tenanted, charged or otherwise disposed of, without the prior written approval of the Collector of Land Revenue, such approval shall in case of transfer lease or charge be endorsed on the memorandum of transfer, charge or lease.
>
> .....
>
> (iii) The above restriction in interest shall cease to be operative after the expiration of 10 years from the date of the registration of this title or from such prior date as may be approved by the Ruler-in-Council.

The facts are therefore different. In our case, we are dealing with a prohibition against transfer until after the land had been fully developed. The other reason why I decline to follow *Wong Leong Sing Anor. v. Wong Tat Ann* is that the case of *Hassan v. Ismail (supra)* was not referred to. Another case referred by Mr. Basalie was *Hee Cheng v. Krishnan* [1955] MLJ 103 where the Court held a contract for the purchase of a house on a Temporary Occupation Licence was unlawful as to allow it would be to defeat the the provision of regulation 40 of the Land Rules 1930 which says: "No licence for the temporary occupation of State land shall be transferrable." It is to be noted that there also the Court was dealing with an absolute prohibition which, as was said earlier, is not the case here. The same can be said of the case of *Murugesan v Krishnasamy & Anor.* [1958] MLJ 92 which was also cited by Mr. Basalie. All these cases were decisions of the High Court and were not referred to in *Hassan v. Ismail,* a decision of the then Federal Court and binding on this Court. I have next to consider whether the transaction is against public policy. Though there is no evidence before this Court as to what is the policy of the Government of the State of Sabah regarding the alienation of land, it can be assumed that land will be given to the landless. Distribution of land would be a form of distribution of wealth. But, if the land is to remain untransferable it is of no economic value. Even where the transfer is allowed but the transfer is restricted to the

natives, like in the case of native land before, the value of the land is comparatively lower. This, the Government of the State of Sabah must have realised because in 1989 it amended the Land Ordinance to allow native land to be subleased to non-native for any term not longer than 99 years. The title to the land is question contains extensive provisions not only for cultivating the land but for maintenance in accordance with good husbandry practice throughout the period of the tenure of the title to the land. I can conclude that upper-most in the mind of the policy maker must have been to bring the idle land in Sabah under cultivation rather than preventing the sale of land. This policy can be achieved by only allowing land to be transferred, that is transferred and registered within the meaning of the Land Ordinance, when the land has been cultivated. Not everyone has the capability, both financial and know-how, to bring land under cultivation with a certain crop. If it is to be construed that a land cannot be sold as distinct from transferred unless it is cultivated, many a person would lose the land they have successfully applied for; particularly the natives of Sabah. The land has to be cultivated within a certain period failing which the government may retake the land. To bring a piece of land under cultivation, with say, cocoa, would, to my knowledge, easily cost between RM2,000 to RM3,000 per acre. To develop 244.9 acres, the size of the land in this case, would require roughly betweenRM500,000 to over RM700,000. Most people would not be able to come up with such a sum of money nor get a loan for such amount. Some years back the Federal Government stepped in to force banks to give loans to natives and other small entrepreuners and this measure bears testimony to the fact that it was near impossible for a native to get a loan. Even after the Federal Government stepped in, the loan under what was called the Credit Guarantee Corporation scheme, was for a miserable few thousands ringgit. Even now, I would think people find it difficult to get loan because of the tremendous fluctuation in the price of the commodities like cooca and palm oil which makes banks wary in giving out agricultural loans. Given those facts, it would mean that very few people would be able to benefit from the land they applied for, and in fact would lose the premium they paid for the land, because, sooner or later, the land will be forfeited by the government for non-development unless they are allowed to sell the land to someone who can afford to develop the land. To construe the prohibition clause of the title in the manner advocated by Mr. Basalie would mean that every successful applicant of land must turn farmer or at least be able to borrow money to develop the land and for those who cannot, there will be quite a lot of them, their land will be forfeited; such a construction would surely defeat the purpose of the government to distribute land to all and to allow all its citizens to share in the wealth of the country. To allow a sale without a transfer until the land is brought into cultivation would serve the government duo policy of distributing wealth to and benefiting all its citizens, and also achieve its policy of bringing every idle land under cultivation. I therefore am of the view that the transaction is not against public policy; in fact, my manner of the construction of the prohibition clause serves the public policy. The transaction, for the same reason, does not defeat any law.

It is to be noted that the plaintiff is setting up his own illegality to set aside the transaction and to obtain possession of the land after it had been fully developed. If the transaction is to be set aside on the ground that it infringes the Land Ordinance, then surely, the result would be that the land has to be forfeited to the Government of the State of the Sabah. For this reason, even assuming the transaction is illegal, I do not see how I can order possesion of the land to be given to the plaintiff when the title to the land is now registered in the names of the 2nd and 3rd defendants.

What I have said thus far render the question of fraud a non-issue because I have found that the plaintiff had willingly executed the agreement D1 and the power of attorney D2 and had agreed to the terms therein. In any event, the plaintiff had failed to prove fraud on the part of any of the defendants. It follows that the 1st defendant can validly sell and in fact had sold the land to the 2nd and 3rd defendants who had no knowledge of any dispute between the plaintiff and the 1st defendant. There is therefore no question of the sale to the 2nd and 3rd defendant being tainted with illegality or fraud. The attempt by the plaintiff to revoke the power of attorney D2 is of no effect because the plaintiff had himself declared in the power of attorney D2 that he had received valuable consideration and had declared the power of attorney D2 to be irrevocable. See Andrew Long on **Powers of Attorney,** pp. 45-46.

The remaining issue is whether the claim is time-barred. Mr. P.K. Lim argued that the plaintiff's claim in any event is statute-barred because the plaintiff by 5 October 1983 became aware of the facts entitling him to rescind the contract and yet did not commence the action till 8 February 1991. For rescission of contract, which is what the plaintiff is claiming, the Limitation Ordinance (Cap.72) item 93 of the Schedule, provides for a period of limitation of three years commencing from the time "when the facts entitling the plaintiff to have the contract rescinded first become known to him." The plaintiff had alleged that he had not intended to sell and that the agreement D1 does not incorporate the terms he had agreed to and that about 5 October 1983 he realised that the land was sold instead of being developed for a "joint venture". Thus, the plaintiff had by 5 October 1983 known of the facts entitling him to rescind the sale of the land which means that he had until 5 October 1986 to issue the writ but, as stated earlier, he did not do so until 8 February 1991. The claim against all the defendants, I agree with Mr. P.K. Lim, is statute-barred.

It was for the reasons that I have just stated that, I on 28 April 1994 dismissed the plaintiff's claim immediately after I heard the closing speeches of Counsel for the parties. I also ordered cost to be paid to the 1st defendant. As for the costs of the 2nd and 3rd defendnts, I ordered Mr. Basalie to personally pay the same. Mr. Chung when applying for costs to be paid by Mr. Basalie under O. 59 r. 8 of the Rules of the High Court 1980 had agruged that:

(1) the plaintiff's case against the 2nd and 3rd defendants was obviously unmaintainable from the outset and this Mr. Basalie knew by virtue of the dismissal of a similar suit No. T87 of 1991 by the plaintiff against the 2nd and 3rd defendants; and
(2) Mr. Basalie did not even attempt to adduce evidence to prove th case against the 2nd and 3rd defendants and thus wasted everyone's time.

The Court was referred to the case of *Karpal Singh v. Atip Bin Ali* [1987] 1 MLJ 291. I invited Mr. Basalie to reply but he preferred to keep quiet. I found that there was substance in the argument of Mr. Chung and, despite my prompting, Mr. Basalie did not bother to reply. As a result I ordered him to personally pay the costs of the 2nd and 3rd defendants. The action against the 2nd and 3rd defendants was very ill-advised and justice would be served if Mr. Basalie and not the plaintiff is to pay the costs.